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THE BRE-X STOCK DEBACLE: WHY THE ENACTMENT OF CANADIAN FEDERAL SECURITIES LEGISLATION WOULD BE GOOD AS GOLD

I. INTRODUCTION

The whirlwind saga of the Bre-X corporation left countless disappointed investors and numerous broken bank books in its wake. In 1993, Bre-X Minerals Ltd. (Bre-X), a Calgary-based gold exploration company, acquired the rights to develop Busang and other Indonesian properties for \$180,000.¹ During the next four years, Bre-X perpetrated the biggest gold mining fraud in history.² Claiming in 1995 that it had stumbled upon one of the world's largest gold finds in the rain forests and rugged hills of Busang, in East Kalimantan, Indonesia, Bre-X conservatively estimated the find to be between 30 and 70 million ounces of gold³ worth between 11.5 and 25.5 billion dollars.⁴ Immediately following the announcement, stock in Bre-X skyrocketed, with investors from around the world trying to cash in on the company's rags to riches success story. The stock, originally a penny stock listed on the Alberta and Ontario Stock Markets, traded on the Toronto Stock Exchange (TSE) and the NASDAQ and rose to more than 200 dollars per share (Canadian) before splitting ten for one in May 1996.⁵ At its peak, Bre-X traded at over 280 dollars per share (Canadian)⁶ and its market value topped 6 billion dollars (Canadian).⁷

1. See Mark Heinzl, *Bre-X Probe Intensifies as Tests Find Little Gold*, WALL ST. J., May 6, 1997, at A3.

2. See Peter Waldman & Jay Solomon, *Gold Fraud Recipe? Bre-X Workers Saw Mine Samples Mixed*, WALL ST. J., May 6, 1997, at A1.

3. See *A Bre-X Chronology*, OTTAWA CITIZEN Mar. 27, 1997, at D1. John Felderhof, Vice Chairman of Bre-X, at one point estimated the find to be 200 million ounces, worth 70 billion dollars. See *Panning For Truth on the Slag Heap of Tarnished Gold*, JAKARTA POST, Sept. 13, 1998, available in LEXIS, Nexis Library, Worldnews File.

4. Dollar values are approximate and are based on the Comex spot price of gold on the last day of Oct. 1995 and Feb. 1997, the months in which the estimates were announced. See WALL ST. J., Nov. 1, 1995, at C1; WALL ST. J., Mar. 3, 1997, at C1.

5. See Heinzl, *supra* note 1.

6. See Bertrand Marotte, *Regulators To Look At Tougher Mining Rules: In-*

John Felderhof, Vice Chairman and chief geologist of Bre-X, was awarded "Prospector of the Year" by the Prospectors and Developers Association of Canada,⁸ and Michael T. de Guzman, the geologist credited with the "discovery,"⁹ was flying high over his achievement. Everything was "golden" for the corporation.

Unfortunately, as the saying goes, all that glitters is not gold, and the tale of the Bre-X corporation provides no exception to the rule. In February 1997, Freeport McMoRan Copper & Gold Inc. (Freeport), a New Orleans-based mining corporation hand-picked by the Indonesian government to run the Busang mine, began drilling at the Busang site in an attempt to confirm Bre-X's findings.¹⁰ However, after two weeks, Freeport found itself in an unenviable position as initial tests failed to yield results comparable to those of Bre-X.¹¹ Freeport chairman Jim Bob Moffet telephoned Bre-X Chairman David Walsh to inform him of the discrepancy and to request that Bre-X officials return to Busang to sort out the problem.¹² One week later, de Guzman boarded a helicopter at Samarinda airport to meet with Freeport officials in Busang.¹³ Unfortunately, the meeting never took place. Seventeen minutes into the journey, de Guzman leapt to his death somewhere over the jungles of Borneo.¹⁴

dustry Officials Welcome Efforts to Tighten Standards after Bre-X Fiasco, OTTAWA CITIZEN, Apr. 12, 1997, at F1.

7. See James McCarten, *Procedural Wrangling Bogs Down Bre-X Hearing*, LONDON FREE PRESS, Oct. 20, 1998, at D2, available in LEXIS, News Library, Worldnews File.

8. See Andrew Willis & Douglas Goold, *Bre-X: The One Man Scam*, THE GLOBE AND MAIL (July 22, 1997) <<http://www.bre-x.com/media/gm072297.htm>>.

9. See Maria Bohuslawsky, *'Hero' Behind Massive Gold Discovery Falls to His Death*, OTTAWA CITIZEN ONLINE (Mar. 20, 1997) <<http://www.ottawacitizen.com/business/970320/886188.html>>.

10. See Jennifer Wells, *The Bre-X Bust: Is the 'World's Greatest Gold Find' a Fraud?*, MACLEAN'S, Apr. 7, 1997, at 50.

11. See Bertrand Marotte, *Bre-X Waited Two Weeks Before Releasing Bad News*, OTTAWA CITIZEN, May 7, 1997, at A1.

12. *Id.*

13. *Id.*

14. See Wells, *supra* note 10. Controversy surrounded the death of de Guzman. Bre-X officials stated that de Guzman had recently learned he had contracted a serious illness. However, de Guzman's family denied the allegation that he committed suicide because he was suffering from hepatitis B. See Anthony De Palma, *Bre-X: From Rags to Riches, Back to Rags*, N.Y. TIMES, May 6, 1997, at D1. Indonesian authorities denied the involvement of foul play and ruled de

Freeport's public announcement that preliminary tests indicated "insignificant amounts of gold"¹⁵ at the Busang site sent Bre-X spiraling into a tailspin from which it would never recover. One day after the announcement, Bre-X stock fell thirteen dollars per share (Canadian), wiping out nearly three billion dollars (Canadian) in market capitalization.¹⁶ Trading in Bre-X was so high that on April 1, 1997, the TSE computers could not withstand the volume and crashed, shutting down the entire exchange for nearly an hour.¹⁷ Bre-X's woes were not limited to a fall in share price, however. On April 8, 1997, Bre-X headquarters were cleared due to a bomb threat¹⁸ and in May, hundreds of local workers in Indonesia, fearing they would not be paid by the suffering corporation, held two Indonesian Bre-X managers hostage for more than two days at the Busang mine.¹⁹

Hoping to prove Freeport's findings incorrect, Bre-X hired an independent consultant, Strathcona Minerals Services, Ltd. (Strathcona), to review the ominous situation.²⁰ Strathcona performed a technical audit of the work done by both Bre-X and Freeport, and on May 3, released an initial report in which it concluded:

1. Only trace amounts of gold have been found in the samples assayed, and there were no samples that gave gold values of economic interest.
2. As a consequence, we believe there to be virtually no possibility of an economic gold deposit in the Southeast Zone I South of the Busang property
5. The gold recovered in the samples submitted by Bre-X has originated from a source other than the Southeast

Guzman's death to be a suicide. See *RCMP Say Bre-X Fraud Far From Being Solved*, OTTAWA CITIZEN, Aug. 14, 1997, at C3 [hereinafter *Far From Being Solved*].

15. *A Bre-X Chronology*, *supra* note 3.

16. See Marotte, *supra* note 6.

17. See *Bre-X Shares Plummet After Fraud Exposed*, L.A. TIMES, May 7, 1997, at D3.

18. See *A Bre-X Chronology*, *supra* note 3.

19. See *Bre-X Officials Being Held by Workers Demanding Pay*, FIN. POST, May 14, 1997, available in 1997 WL 409465.

20. See Marotte, *supra* note 11.

Zone of the Busang property and has resulted in falsification and misrepresentation of many thousands of samples with consequent and subsequent erroneous estimates of gold resources.²¹

Freeport's findings were accurate. There was no gold at the Busang site. One week after the announcement, both the TSE and the NASDAQ delisted Bre-X from the exchanges,²² bringing the precipitous decline to a screeching halt.

While Bre-X officers escaped virtually unscathed financially,²³ unsuspecting investors were not so lucky. By the time the nightmare had finally ended, investors, unable to sell their shares in Bre-X, had lost millions on the bogus find.²⁴ The fraud cost more than dollars and cents, however. In Vancouver, a sixty-two-year-old attorney shot and killed himself after losing 3 million dollars investing in Bre-X stock.²⁵ As Felderhof sat in his posh resort home in the Cayman Islands,²⁶ the family of Lawrence Beadle sat in prayer, mourning their loss.

While an investigation into the disaster has begun, the Royal Canadian Mounty Police declared in August 1997 that the fraud was far from being solved.²⁷ However, slowly but surely the pieces of this complex puzzle are surfacing and beginning to fit together. Canadian investigators in Indonesia report that de Guzman perpetrated the fraud with about 60 ounces of gold bought from a local Borneo tribesman.²⁸ With those 60 ounces, de Guzman weaved an elaborate scheme that even Rumpelstiltsken would have been proud of. Investigators

21. Strathcona Minerals Services, Ltd., *Busang Technical Audit-Interim Report* (May 3, 1997) <<http://www.bre-x.com/media/pr050597letterI.html>> [hereinafter *Interim Report*].

22. *Toronto Stock Exchange Delists Bre-X*, CHI. TRIB., May 8, 1997, available in 1997 WL 3546650.

23. David Walsh (CEO), Jeanette Walsh (Secretary), and John Felderhof (Vice-Chairman) all sold shares in Bre-X prior to the decline. Combined, the three earned 77 million dollars selling shares of Bre-X. See Marotte, *supra* note 6.

24. See Edward Wyatt, *Small Investors and Big Money Taken by Tale of Jungle Gold*, N.Y. TIMES, May 6, 1997, at A1.

25. See David Baines, *Vancouver Man Killed Self Over Bre-X Decline*, OTTAWA CITIZEN, May 9, 1997, at F2.

26. See Joe Warmington, *Nice Place to Hide*, CALGARY SUN (May 11, 1997) <http://www.canoe.ca/CalgaryBrex/may11_2.htm>.

27. See *Far From Being Solved*, *supra* note 14.

28. See Willis & Gould, *supra* note 8.

believe that "rock samples drilled and crushed at Busang . . . were sent on a 30 hour barge ride to Bre-X's offices in Samarinda on the coast of the island of Borneo."²⁹ Once at the office, the crushed rock was placed around a pool table where de Guzman and others mixed the raw ore with a combination of river gold and barren crushed rock from Busang.³⁰ Investigators sense that de Guzman had a series of buckets containing different concentrations of gold surrounding the pool table. "If he wanted to produce a sample that would assay out to three grams of gold for each tonne of rock, he would take a scoop from one bucket. If his goal was four grams of gold per tonne, he took it from another."³¹ Summing up the fiasco best, Strathcona in its report stated,

the magnitude of the tampering with core samples that we believe has occurred and resulting falsification of assay values at Busang, is of a scale and over a period of time and with a precision that, to our knowledge, is without precedent in the history of mining anywhere in the world.³²

Public outcry following the disaster was tremendous. Investors from around the world sought retribution for their losses.³³ "In the orgy of recriminations that inevitably follows big scandal—and particularly one in which lots of people lose a lot of money—we frequently succumb to an impulse to engage in indiscriminate finger-pointing."³⁴ Much of this "finger-pointing" has been directed at the TSE and its regulations. However, in a speech delivered before the Corporate Securities Congress, Rowland Fleming, President and CEO of the TSE, assured investors that the exchange was not to blame.³⁵ Vigorously defending the TSE, Fleming declared that "no ex-

29. *Id.*

30. *See id.*

31. *Id.*

32. *Interim Report*, *supra* note 21.

33. Several complaints have been filed naming as defendants Bre-X Minerals, Ltd., certain of its current officers and directors, and others. *See Bre-X Minerals, Ltd.*, CANADA NEWSWIRE (Apr. 16, 1997) <<http://www.newswire.ca/releases/April1997/16/c3460.html>>; DePalma, *supra* note 14.

34. Jeffrey MacIntosh, *Don't Point Fingers at Regulatory System for the Bre-X Debacle*, FIN. POST, May 8, 1997, at 15, available in 1997 WL 4094293.

35. *See The TSE: "A Reliable Market for the Benefit of the Public"*, CANADA NEWSWIRE, May 6, 1997 [hereinafter *Remarks*].

change in the world could have prevented the Bre-X scandal No matter how tough the securities regulations or laws are, perpetrators of deceit . . . will find a way to break the rules."³⁶ Fleming's comments may have merit. However, while other world markets "have contributed a long line of fraudsters"³⁷ . . . it seems like Canada produces more stock market fraud than do other countries."³⁸ One reason for this phenomenon might be that unlike other major industrial nations like Japan, Great Britain and Germany, Canada does not have a national regulatory agency for securities. Instead, it "leaves the task to the provinces, which pursue oversight with varying degrees of enthusiasm."³⁹ In his remarks, Fleming acknowledged this weakness in Canada's securities law and suggested that a change was needed.⁴⁰ However, as of the date of this writing, a national regulatory system has not been adopted by Canada.

If the Canadian securities markets are to effectively compete for the world's capital, stronger legislation must be adopted. At the present time, "there aren't enough teeth behind the Canadian . . . laws to scare companies into compliance,"⁴¹ and "although . . . no empirical research directly demonstrates that concerns about integrity affect market activity, both authoritative commentators and common sense tell us that if investors

36. *Id.*

37. Examples of securities fraud taking place in America include "Crazy" Eddie Antar and Barry Minkow. See Floyd Norris, *For Exchanges North of Border, A Fresh Fraud*, N.Y. TIMES, May 5, 1997, at D1.

38. *Id.*

In the late 1980's, the Vancouver Stock Exchange . . . was dubbed 'the scam capital of the world,' and just last December, investors in Timuktu Gold Corp.—a high-flier on the equally speculative Alberta Stock Exchange—saw their shares plunge more than 90% after the company's claimed gold strike in West Africa turned out to be a fraud.

William C. Symonds, *Black Eye for a Blue Chip Exchange*, BUS. WK., Apr. 21, 1997, at 106. For other examples of Canadian stock market frauds, see Norris, *supra* note 37.

39. Norris, *supra* note 37.

40. Fleming stated:

If it wasn't clear before Bre-X, it certainly should be by now that if Canadian companies are going to compete for the world's capital, they have to have a national regulatory framework that is totally as competitive and efficient and that speaks for the quality as well as regulates Canadian securities standards.

Remarks, supra note 35.

41. Symonds, *supra* note 38.

do not anticipate fair treatment, they will avoid investing in securities.⁴² Put more simply, if investors believe that the Canadian regulatory framework is incapable of protecting their investments, they will take their money to a more secure market.

In their 1997 paper entitled "Legal Detriments of External Finance,"⁴³ professors Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny showed that "countries with poorer investor protection, measured by both the character of legal rules and the quality of law enforcement, have smaller and narrower capital markets."⁴⁴ To prove this theory, the professors looked at the ratio of stock market capitalization held by minority shareholders to gross national product.⁴⁵ In other words, the authors looked to the percentage of non-internal finance in the countries' securities markets.⁴⁶ Not surprisingly, Canada's ratio was significantly below the average for English common law countries,⁴⁷ which are considered to offer the most protection to investors.⁴⁸ In fact, Canada's ratio was even lower than that of some French civil law countries,⁴⁹ which are considered to offer the least protection to investors.⁵⁰

It is not difficult to understand why the authors elected to analyze internal finance in their study. The amount of internal

42. WILLIAM L. CARY & MELVIN A. ROSENBERG, CASES AND MATERIALS ON CORPORATIONS 839 (7th ed. 1995). See also ABA Committee on Federal Regulation of Securities, *Report of the Task Force on Regulation of Insider Trading—Part 1: Regulation Under the Antifraud Provisions of the Securities Exchange Act of 1934*, 41 BUS. LAW. 223 (1985). See also Jeffrey M. Laderman et al., *The Epidemic of Insider Trading—The SEC is Fighting a Losing Battle to Halt Stock-Market Abuses*, BUS. WK., Apr. 29, 1985, at 7 (stating that "[i]f the investor thinks he's not getting a fair shake, he's not going to invest, and that is going to hurt capital investment in the long run").

43. Rafael La Porta et al., *Legal Detriments of External Finance*, 52 J. FIN. 1131 (1997).

44. *Id.* at 1131.

45. See *id.* at 1134.

46. To measure this, the authors "roughly estimate[d] the average fraction of equity held by insiders by looking at the country's 10 largest publicly traded nonstate firms, finding the combined ownership stake of the three largest shareholders in each of these firms, and averaging that stake over the ten firms." *Id.* at 1133.

47. See *id.* at 1138.

48. Rafael, *supra* note 43, at 1132.

49. See *id.* at 1138.

50. See *id.* at 1132.

finance reveals a great deal about the level of investors' confidence in the protections offered by a country's securities laws. It is well settled that one of investors' primary concerns in investing is how to control management and ensure they get their investment back.⁵¹ In their paper entitled "A Survey of Corporate Governance," Professors Shleifer and Vishny explore this agency problem, theorizing that in a well functioning securities system, investors should be able to rely on the law to provide them with the power to control unruly agents. Unfortunately, many countries' laws do not grant enough power to the shareholders and, thus, they are left with a level of legal protection inadequate to control agents.⁵² In such countries, where "legal protection of investors is less substantial, either because laws are bad or because courts do not enforce these laws, . . . firms . . . have difficulty raising outside funds, and finance most of their investment internally."⁵³ That Canada has such a high percentage of internal ownership compared to other countries, reveals that the system offers inadequate protection for its investors, and according to the authors, this inadequate protection has resulted in a narrow capital market.⁵⁴

"The importance of the securities market has been emphasized . . . by repeated statements of the vast amounts of investment capital required by Canadian industry . . . especially for the development and exploitation of new sources of energy, for transportation and for the financing of small business."⁵⁵ A loss of investment capital will severely cripple Canadian corporations as well as the Canadian economy. Steps must be taken to prevent this from happening.

This paper is designed to suggest that Canada adopt a national regulatory body to enforce Canadian securities law. Part II will detail the development of Canada's current system of securities regulation, from the enactment of the first provincial securities act to the adoption of the closed system model,

51. See Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 737 (1997).

52. See *id.* at 770.

53. *Id.*

54. See discussion *supra* Part I.

55. Phillip Anisman & Peter W. Hogg, *Constitutional Aspects of Federal Securities Legislation*, in 3 PROPOSALS FOR A SECURITIES MARKET LAW IN CANADA (Ottawa: Minister of Supply & Services Canada ed., 1979).

Canada's current regulatory system. Attention will be paid to similarities between Canada's laws and those of Canada's neighbor to the south, the United States. Part II will then shift gears, focusing on weaknesses in the Canadian system, from problems administering the law to problems enforcing it. Next, the paper will discuss attempts by the local and federal branches of the Canadian government to overcome these weaknesses via cooperation and attempts at uniform legislation. Part II will conclude by arguing that although the provincial system in place today was appropriate in the past, given the state of the world's economy, advances in technology, and the securities markets in general, proper regulation requires federal intervention. It will analyze changing judicial sentiment which will make this enactment possible, and briefly look at a draft statute, pointing out how such a statute could alleviate many of the problems that plague Canada's securities markets.

Part III will mirror the structure of Part II, beginning by detailing the development of Australia's current regulatory framework, from the adoption of the English regulations to the enactment of the Corporations Act, 1989, Australia's current regulatory system. Parallels will be drawn between the weaknesses in Australia's former schemes and the woes Canada is currently experiencing in its quest to create a satisfactory regulatory scheme. Attention will be paid to the troubles Australia faced in its attempt to enact a federal scheme and how it overcame these obstacles. Part III will then briefly analyze the Corporations Act, 1989, which mandates the creation of the Australian Securities Commission, and sets forth the structure of Australia's national regulatory scheme. Finally, Part III will demonstrate the success the Corporations Act, 1989 has had in the administrative, enforcement, and legislative areas of the law, success which has eluded Canada's securities law.

The paper will continue by briefly summarizing the key points in the previous two sections, concluding that the striking similarities in the development of these two countries' systems make Australia's system a viable model for Canada to consider when it finally enacts federal law. The reader is cautioned, however, that the purpose of this paper is not to suggest that the Australian system offers the only or even the best possible solution for Canada.⁵⁶ It is merely to offer one alter-

56. Clearly, the U.S. model offers another viable solution. Australia was sim-

native Canada might consider in its quest for an answer to its regulatory quagmire.

II. CANADA'S CURRENT SECURITIES SYSTEM

In order to understand the Canadian securities system and its faults, an introduction to the governmental framework of Canada and the development of the Canadian securities system is required. Legislative jurisdiction is allocated among the thirteen jurisdictions of Canada⁵⁷ according to the British North America Act, 1867 (BNA Act).⁵⁸ Titled "Legislative Authority of the Parliament of Canada," Section 91 of the BNA Act sets forth those subjects which fall under the exclusive jurisdiction of the federal government. Included are the regulation of trade and commerce,⁵⁹ the criminal law,⁶⁰ and "[l]aws for the [p]eace, [o]rder and [g]ood [g]overnment of Canada, in relation to all [m]atters not coming within the [c]lasses of [s]ubjects . . . assigned exclusively to the [l]egislatures of the [p]rovinces."⁶¹ By contrast, Section 92 of the BNA Act sets forth those areas which fall under the exclusive jurisdiction of the provincial government. Included in this list are local works and undertakings,⁶² property and civil rights in the province,⁶³ and the incorporation of companies with provincial objects.⁶⁴

While the federal government has enacted legislation affecting the securities market by employing its jurisdiction over crime, only the provinces, exercising their control over legisla-

ply chosen for the parallels that can be drawn between the States' securities industries.

57. The thirteen jurisdictions are the federal government, the Northwest Territories, the Yukon Territory, and the ten provinces (from east to west), Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia. See Henry Joseph Knowles et al., *Securities Regulation in Canada*, in 1 INTERNATIONAL SECURITIES REGULATION—CANADA 1 (Robert C. Rosen ed., 1994).

58. British North America Act, 1867, R.S.C. (1867) (Can.); CANADIAN CONSTITUTIONAL DOCUMENTS CONSOLIDATED 145 (Bernard W. Funston & Eugene Meehan eds., 1994) [hereinafter BNA Act]. The BNA act was renamed the Constitution Act, 1867 in section 53 of the Constitution Act, 1982. *Id.* at 43.

59. BNA Act § 91(2).

60. *Id.* § 91(27).

61. *Id.* § 91.

62. *Id.* § 92(10).

63. *Id.* § 92(13).

64. BNA Act § 92(11).

tion in relation to property and civil rights in the provinces,⁶⁵ have enacted statutes that can properly be termed securities legislation. Led by Manitoba, the provinces initially enacted statutes aimed at punishing perpetrators of fraud.⁶⁶ Ontario followed suit in 1928, enacting the *Security Frauds Prevention Act*, which provided for investigations into securities frauds.⁶⁷ Other provinces entered the field, enacting legislation similar in form to the Ontario Act through the 1930's.⁶⁸

Subsequent securities legislation was greatly influenced by the American system, which emphasizes disclosure.⁶⁹ In 1947, Ontario enacted legislation similar to the United States Federal Securities Act of 1933.⁷⁰ This new law required the disclosure of information in prospectuses distributed to the public.⁷¹ Like the '33 Act, the Ontario legislation included a provision that imposed strict liability upon anyone who authorized a prospectus containing any material false statement.⁷² Like the '33 Act, however, this legislation stopped short in that it only dealt with disclosures relating to initial public offerings.⁷³ Despite the fact that the United States corrected this shortcoming in the '33 Act one year later,⁷⁴ Canada would have to wait twenty years before the provinces would enact legislation to

65. This right has been interpreted to include contracts, dealings with property and the regulation of businesses, trades and professions. See Anisman & Hogg, *supra* note 55, at 144.

66. "The Manitoba *Sale of Shares Act* of 1912 required that any company not organized in Manitoba had to obtain a license to sell shares in Manitoba and required that certain documents dealing with the financial status of the company be filed before a license would be given." MARK R. GILLEN, *SECURITIES REGULATION IN CANADA* 58 (1992).

67. *Id.*

68. *Id.*

69. *Id.* at 57.

70. S.O. 1947, c. 98.

71. See GILLEN, *supra* note 66, at 58-59.

72. *Id.* at 59. Section 11(a) of the '33 Act, entitled Civil Liabilities on Account of False Registration Statement, creates a cause of action for any purchaser of a security if the prospectus contains an untrue statement of material fact or omits a material fact. The section makes every person who signed the registration statement liable, as well as directors, underwriters, and experts who prepared the statement. See 15 U.S.C.A. §§ 77a to 77aa (West 1981); *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968).

73. See GILLEN, *supra* note 66, at 59.

74. The Federal Securities Act of 1934 focused on continuing disclosure requirements in the secondary market of securities. See 15 U.S.C.A. §§ 78a to 78ll (West 1981) [hereinafter the '34 Act].

rectify the deficiency.

The Kimber report⁷⁶ marked the beginning of modern securities regulation in Canada. Sparked by the Shell Oil takeover of Canadian Oil,⁷⁶ the Commission primarily concerned itself with insider trading and takeover bids, but it also addressed the degree of disclosure appropriate in secondary markets.⁷⁷ Like the United States Federal Securities Act of 1934,⁷⁸ the report recommended requirements for the distribution of periodic financial statements, mandatory proxy solicitation, and reporting of insider trading.⁷⁹ Many of these recommendations were codified in the Ontario Securities Act of 1966, which was subsequently enacted in all of the Western provinces.⁸⁰

"By the time the western provinces had adopted the Uniform Act, Ontario had [once] again reassessed the status of securities law . . . This reassessment ultimately led to the enactment of the 'closed system' statute in 1978."⁸¹ Supplementing the prior legislation, the closed system is based on the concept that certain insiders do not need the protection provided by the extensive disclosure required by the securities laws.⁸² However, outside of this select group, trading must be accompanied by the appropriate disclosure. Piggy-backing the innovation of Ontario yet again, most of the provinces have adopted the "closed system" model with subtle variations.⁸³

Many weaknesses can be exposed in Canada's fragmentary system. Given the case at hand, the most troublesome is the fact that the provincial governments, under the current system, lack the jurisdiction to enforce their legislation outside of

75. The Kimber Report, more formally the "Report of the Attorney General's Committee on Securities Legislation in Ontario," was named after then chairman of the Ontario Securities Commission. See DAVID L. JOHNSTON, CANADIAN SECURITIES REGULATION 15 (1977).

76. Controversy arose because insiders used their knowledge of the takeover and bought shares of Canadian Oil prior to the announcement of the takeover, thus reaping the benefit of a lower share price. See GILLEN, *supra* note 66, at 59.

77. See *id.* at 60.

78. 15 U.S.C.A. §§ 78a to 78ll.

79. See GILLEN, *supra* note 66, at 60. For the corresponding requirements in the '34 Act, see 15 U.S.C.A. §§ 13, 14, 16, 23.

80. Gillen, *supra* note 66, at 60.

81. *Id.*

82. *Id.*

83. *Id.*

the province.⁸⁴ Thus, even if a violation such as fraud or insider trading is detected, prosecution is nearly impossible. As John Woods, a former stock exchange floor trader who now edits the investor newsletter *Canada Stockwatch* has said, "lax regulators [have] made . . . Canada the ideal place to pull off 'the perfect crime.'" You're never, ever caught. Even if you are, you're never convicted. It is virtually impossible to prove."⁸⁵ For proof of this chilling reality, one need only look at the Bennett affair.⁸⁶ In 1988, Doman Industries Limited (DIL), a British Columbia company, entered negotiations with Louisiana-Pacific Corporation (LP) whereby LP would acquire all or a controlling interest in DIL.⁸⁷ After a public announcement, stock in DIL rose considerably. Russell Bennett and his brother, William, former Prime Minister of B.C., had been acquiring shares in DIL for nearly a year and had, by the time of the announcement, acquired over 500,000 shares in the Canadian corporation.⁸⁸ Russell Bennett and Herb Doman, president of DIL, were acquaintances, and when the deal between the two corporations fell through, a timely call was placed from DIL's offices to Bennett's.⁸⁹ While news of the failed takeover caused the price of DIL to fall, the Bennetts were able to sell their shares in DIL prior to the announcement, enabling them to capitalize on the higher market price of DIL.⁹⁰ The Bennetts' trading clearly constituted insider trading. However, Ontario was unable to convict the brothers because, due to the Bennett's residency (British Columbia), it could not enforce its subpoena to compel the Bennetts to testify as to what was said during the telephone conversations, and thus could not prove the claim.⁹¹ It will be interesting how the Bre-X saga plays

84. See Phillip Anisman, *The Regulation of the Securities Market and the Harmonization of Provincial Laws*, in HARMONIZATION OF BUSINESS LAW IN CANADA 79, 81 (Ronald C.C. Cuming ed., 1986).

85. Dana Flavelle, *The Bre-X Wake-up Call*, TORONTO STAR, Oct. 12, 1997, at D1, available in LEXIS, Nexis Library, Worldnews File.

86. For an in depth look at the Bennett Case, see Cally Jordan, *Lessons From the Bennett Affair*, 38 MCGILL L.J. 1071 (1993).

87. *Id.* at 1074.

88. *Id.*

89. *Id.*

90. *Id.*

91. Jordan, *supra* note 86, at 1077. The Ontario High Court refused to assist in this matter stating that since the law was "silent outside of Ontario," there was no statutory basis upon which the subpoena could be enforced. *Id.* at 1078.

out, considering Bre-X was incorporated in Alberta and traded in Ontario.

The provinces' inability to act beyond their territorial boundaries renders them incapable of properly regulating the securities markets. Realizing that the probability of conviction for securities violations is slim, "[p]erpetrators of fraud . . . have exploited the potential for evasion of securities law by organizing fraudulent schemes on an [interprovincial] basis."⁹² Barring constitutional amendment or federal participation in the field, this situation will continue indefinitely. Faced with this reality, investors are forced to either invest in the Canadian markets, where there is no guarantee that their investment is safe, or take their money to more secure markets where regulations are properly enforced. Given the facility with which an investor can invest in foreign markets, logic dictates, and the article by Shleifer and Vishny illustrates,⁹³ that fewer and fewer investors will choose the former.⁹⁴

"Regulation exists not only in the interests of investors but also in the interests of enterprises which need to raise capital."⁹⁵ As a result, Canada's securities framework affects more than just investors. Through legislation that differs in form and substance, the provinces place an enormous burden upon companies that must meet the numerous legislative requirements in the various jurisdictions. A company trying to conform to the laws of ten provincial jurisdictions will incur heavy costs because of the difficulty in meeting the different requirements. Furthermore, "[i]ssuers of securities must pay a sum to clear and distribute prospectuses, insider trading reports and other documents across the country—not to mention 12 sets of filing fees to the commissions themselves."⁹⁶ Rather than

92. Anisman & Hogg, *supra* note 55, at 141.

93. *See supra* Part I.

94. Losing these investors will hurt more than the Canadian markets. Corporations, which rely heavily on the capital raised through the selling of securities on the Canadian exchanges, will no longer be able to easily raise investment capital. As a result, many will be forced to forgo investment projects such as the building of new factories. These factories could have provided a source of more jobs and would have had other beneficial effects upon the Canadian economy. Thus, the provinces' lack of enforcement power hurts the Canadian economy as a whole.

95. ROBERT BAXT, *SECURITIES INDUSTRY LAW* 2 (4th ed., 1993).

96. Bertrand Simon, *Canada Divided Over a Single Watchdog*, *FIN. TIMES*, May 26, 1996, at 23.

fighting this legislative hodge-podge in which "the laws of one province impose greater burdens than those of others, [corporations] engaging in the regulated activity may . . . avoid [the laws] by conducting their business elsewhere or by excluding residents of [a particular] province from participation in a particular transaction."⁹⁷

While the provinces have attempted to overcome these weaknesses through cooperation and attempts at uniform legislation, their efforts have proven ineffective. Canadian Securities Administrators have met since the 1950's, producing joint policy statements, studying potential new policy developments, and conducting joint hearings "to avoid inconsistent requirements which would create impediments to the efficient functioning of the securities market and thus undermine . . . the purpose of the legislation."⁹⁸ Still,

securities regulation in Canada remains less than harmonious [D]espite continuous efforts by the Canadian Securities Administration to achieve a uniform or compatible national system of regulation, . . . the provincial laws and administrative policies differ in substance and in detail and there is no prospect of a diminution in regulatory diversity or its consequences.⁹⁹

This problem stems in part from the dynamic nature of the securities markets. In order to adapt to the constant changes in information and technology, provincial legislators must continually amend their securities law. This has been the case throughout the history of Canadian securities regulation.¹⁰⁰ In the interest of keeping legislation uniform throughout the provinces, the remaining provinces are then forced to amend their law as well. However, by the time these provinces amend their laws, amendments are being made to the amendments. Further, "given the existence of ten different administrations and ten different governments, there are bound to be honest differences of opinion, political differences, inequalities in the resources available, [and] in the standards of administra-

97. Anisman, *supra* note 84, at 81.

98. See GILLEN, *supra* note 66, at 61.

99. Anisman, *supra* note 84, at 127.

100. *Id.*

tion The result is a permanent state of unevenness."¹⁰¹ Thus, it seems that even with cooperation, problems will continue to plague the system.

Federal participation in the securities market is long overdue. The securities system in Canada has undergone widespread development over the years and no longer belongs within the exclusive jurisdiction of the provinces. "The Confederation of 1867 was a hurried, rickety, political unification [and there] was little travel or trade between . . . the central provinces."¹⁰² Thus, the framers did not foresee the development of the securities market. However, while the framers did not consider this future development,

[t]here is little doubt that the Fathers of Confederation envisaged vesting in the federal government primary responsibility for directing the national economy . . . as well as other facets of government deemed by them to be of national importance. To the provinces they reserved their pre-Confederation roles of regulating private law questions affecting property and civil rights 'in the Province' and matters 'of a merely local or Private Nature.'¹⁰³

Unfortunately, through the years, the judicial system has given validity to provincial acts, thus making federal participation in the securities area less likely to occur. In the landmark case of *Lymburn v. Mayland*,¹⁰⁴ the Privy Council¹⁰⁵ upheld the Alberta Security Frauds Prevention Act, 1930, as a valid exercise of provincial jurisdiction.¹⁰⁶ "[T]he case, now the leading decision in the field, has been broadly read so that in most instances in which a question concerning the validity of a securities act has arisen, the provincial legislation has been up-

101. *Id.* at 129.

102. Edward J. Waitzer & Anton Sahazizian, *Coordinate Securities Regulation: Getting to a More Effective Regime*, in *SECURITIES REGULATION: ISSUES AND PERSPECTIVES* 101, 104 (Carswell ed., 1994).

103. Jacob S. Ziegel, *Harmonization of Provincial Laws, With Particular Reference to the Commercial, Consumer and Corporate Law*, in *HARMONIZATION OF BUSINESS LAW IN CANADA* 1, 1 (Ronald C.C. Cuming ed., 1986).

104. [1932] 2 D.L.R. 6.

105. "At Confederation, the Judicial Committee of the Privy Council was the final court of appeal from all colonial courts." PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 202 (3d ed., 1992).

106. See Anisman & Hogg, *supra* note 55, at 144.

held.¹⁰⁷ Courts have even upheld provincial legislation in cases where trading was interprovincial and where there was similar federal legislation.¹⁰⁸ "The reluctance of the courts to strike down the provincial securities legislation likely stems in part from the fact that there is no federal securities law so that a declaration of the invalidity of a provincial act or any of its provisions would create a potential gap in the existing regulatory scheme."¹⁰⁹

If the Canadian government is to enact federal securities law by exercising their power over trade and commerce, the legislation will have to be able to withstand Constitutional scrutiny. Undoubtedly, the provinces, unwilling to relinquish control over a large revenue source, will challenge the legislation in court as an invalid intrusion upon their Constitutionally granted power over property and civil rights. Clearly, an overlap exists between the property and civil rights power and the trade and commerce power. "Indeed, it might be said that every trade and commerce power can also be construed as falling within property and civil rights."¹¹⁰ However, as Sir Montague Smith stated in *Citizens Insurance Co. v. Parsons*,¹¹¹ it "could not have been the intention of [the framers of the Constitution] that a conflict exist; and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other."¹¹²

Over the years, the courts have wrestled with Constitutional challenges relating to the concurrent, yet conflicting, power over trade and commerce and property and civil rights. In *General Motors of Canada v. City National Leasing*,¹¹³ Chief Justice Dickson, hoping to simplify the matter, offered a three step analysis to determine whether a challenged provision of federal legislation may be upheld as a valid exercise of the federal government's power over trade and commerce. The second step of this analysis focuses on the validity of the feder-

107. *Id.*

108. See Don Tse, *Establishing a Federal Securities Commission*, 58 SASK. L. REV. 427, 435 (1994).

109. Anisman & Hogg, *supra* note 55, at 145.

110. Tse, *supra* note 108, at 436.

111. [1881] 7 A.C. 96.

112. *Id.* at 109.

113. [1993] 58 D.L.R. 4th 255.

al act.¹¹⁴

To determine the validity of a federal act, courts must ascertain whether the legislation meets the criteria set forth in *MacDonald v. Vapour Canada, Ltd.*¹¹⁵ and *Attorney General of Canada v. Canadian National Transportation*.¹¹⁶ In *Vapour Canada*, Chief Justice Laskin proposed three hallmarks of validity to determine whether legislation subjected to constitutional scrutiny is a valid exercise of the federal government's power over trade and commerce. First, the courts must determine whether the law contains a general regulatory scheme. "Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry."¹¹⁷ Seven years later, in *Canadian National Transportation*, Chief Justice Dickson added two further criteria:¹¹⁸

First, the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting. Second, [the legislation must be the type where] the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.¹¹⁹

Application of the courts' criteria reveals that the enactment of securities law is a valid exercise of the federal government's power. While conjecture over the form and content of a federal act is mere speculation at this point, it is safe to say that the legislation will take the shape of a regulatory

114. The other branches of the analysis ask whether the challenged provision can be viewed as intruding on provincial powers and whether the challenged provision is sufficiently integrated into the federal scheme. *Id.* at 271. However, for purposes of this paper, it is impractical to discuss the other two steps of Chief Justice Dickson's analysis because a federal securities act is only a theory at this point and there is no way of knowing what form the legislation will take or what provision of the legislation the provinces will challenge.

115. [1976] 66 D.L.R. 3d 1 (S.C.C.).

116. [1983] 76 C.P.R. 2d 1, 3 D.L.R. 4th 16.

117. *General Motors*, 58 D.L.R. 4th at 268.

118. Chief Justice Dickson indicated that, while these criteria may be used by the Courts, they do not constitute an "exhaustive list, nor is the presence of any or all of these indicia necessarily decisive. The proper approach . . . is still . . . a case by case analysis." *Id.* at 269.

119. *Id.*

scheme subject to the oversight of a federal body and "[w]hile at first glance there may be contention over the third requirement, a closer examination reveals otherwise."¹²⁰ As Don Tse points out, federal securities legislation "is not legislation aimed at the industry of trading in securities, [rather] it is aimed at commerce in general, and financing through the issuance of securities, specifically."¹²¹ Further, while the provinces will undoubtedly argue that they have effectively legislated in the field of securities law since the beginning of the century, and therefore, that any federal interference in the field is completely unwarranted, quite the contrary is true. As this paper has demonstrated, developments in the securities industry have rendered the provinces incapable of effectively legislating in the field. Finally, omitting any province from the benefits of this legislation defeats the very purpose for which the legislation is to be enacted. The purpose of the legislation is to facilitate the raising of capital throughout all of Canada. If the legislation does not apply to one of the provinces, fraudsters will simply carry out their wrongdoing in that province, beyond the reach of the legislation's authority and the legislation will have accomplished nothing more than to perpetuate the status quo. Thus, by satisfying the five criteria set forth by the courts, it seems as though federal securities legislation would survive constitutional scrutiny.

Over the past three decades, many economists and legal scholars have recommended the implementation of a federal securities body, yet none of the proposals have come to fruition. Alternatives range from "the addition of a thirteenth administrator to replacement of all of the provincial agencies by a single federal one."¹²² To date, the most significant proposal was made in 1979 by the Corporate Research Branch of

120. Tse, *supra* note 108, at 437.

121. *Id.*

122. Anisman, *supra* note 84, at 130. Other suggestions have been the creation of a joint national commission to administer the provincial laws, or both federal and provincial laws. For another novel solution to the problem, see Jean Martel, *Comments on "Coordinated Securities Regulation: Getting to a More Effective Regime"*, in *SECURITIES REGULATION: ISSUES AND PERSPECTIVES* (Carswell ed., 1994) (describing the 1994 proposal of the Honorable Marcel Massé. The proposal endorses the adoption of federal legislation governing intra-provincial securities operations of participating provinces and inter-provincial securities operations among all the provinces, regardless of participation in the scheme).

the Department of Consumer and Corporate Affairs.¹²³

Written in the form of a draft statute entitled "The Canada Securities Market Act" (CSMA), the proposal recognized the national character of the securities industry as well as the need for federal regulation in the field to ensure the continued success not only of the securities industry, but also the well-being of the Canadian economy. Section 1.02 of the CSMA illustrates this understanding:

It is hereby declared that

(a) the efficient functioning of the capital market will facilitate the exploitation of natural resources in Canada, the development of Canadian industry and, generally, the economic well-being of Canada; . . .

(f) national enforcement mechanisms are necessary to detect, prevent and remedy fraudulent conduct, especially in light of the interprovincial and international character of modern securities markets and of fraudulent securities schemes which necessitate cooperation between Canadian law enforcement agencies and those of other nations;

(g) the confidence of investors in the honest, fair and efficient operation of the Canadian securities market and in the effectiveness of its regulation is essential to the attainment of a broadly based source of capital for Canadian industry and to the efficiency of the securities market generally; [a]ll of which can best be accomplished by an independent public body to regulate the Canadian securities market . . . over which the Parliament of Canada has legislative jurisdiction . . .¹²⁴

To achieve these aims, Section 15.01 established a federal body, the Canadian Securities Commission (the Commission), to administer and enforce provisions of the Act.¹²⁵ The Commission was to be given broad investigatory powers as well as the power to enforce penalties detailed in the CSMA. These

123. *See generally* 1 MINISTER OF SUPPLY AND SERVICES CANADA, CONSUMER AND CORPORATE AFFAIRS CANADA, PROPOSALS FOR A SECURITIES MARKET LAW FOR CANADA (1979).

124. The Canadian Securities Market Act § 1.02 (1979) [hereinafter CSMA].

125. *See id.* § 15.01.

penalties included fines and imprisonment for violations of provisions of the CSMA.¹²⁶

The most significant factor of the CSMA, however, was simply that it was federal law. Section 16.15 states that the act "is binding on Her Majesty in right of Canada or a province and any agent thereof."¹²⁷ Thus, for the first time in Canada's history, securities law would be truly uniform throughout the provinces. Corporations would no longer have to comply with multiple sets of regulations nor would they be forced to pay multiple sets of registration and filing fees. Further, because federal law has the power to stretch across the provincial borders, the word "enforcement" would finally have meaning when used in the securities law context. Travesties of justice such as the Bennett affair could finally become a thing of the past, and investors' confidence in the Canadian securities markets could finally be restored. While the proposed statute "has since served as the basis for revisions of numerous provincial statutes and in the future may form the foundation of a federal law,"¹²⁸ the federal government indicated in 1982 that it did not intend to implement the proposal.¹²⁹ As a result, the provincial system of regulation remains in effect today, and the problems that plague Canadian securities law remain a blemish on the securities markets.

III. AUSTRALIA'S SECURITIES SYSTEM

The development of the present Australian securities system closely mirrors that of the Canadian regime. While companies existed in Australia in the early 1800's,¹³⁰ "[a]part from

126. For example, § 14.10 provides that a person who:

(a) knowingly or recklessly makes a misrepresentation in violation of a provision of this Act, a regulation under it or a by-law, . . . is guilty of an indictable offense and is liable to a fine of \$25,000 or to imprisonment for ten years or to both.

Id. § 14.10.

127. *Id.* § 16.15.

128. Stikeman, Elliot, *Canada, in* INTERNATIONAL SECURITIES LAW 31, 32 (1996).

129. See Waitzer & Sahazizian, *supra* note 102, at 106.

130. "[T]he few business organizations operating in the infant colony of New South Wales followed the contemporary English mixture of deed of settlement companies, chartered companies, companies incorporated by private statute and quasi-corporations. The first native company was the Bank of New South Wales,

some minor legislation enabling joint stock companies to sue and be sued . . . there was no significant Australian [corporate] legislation until [the] English Act of 1862 was adopted by each colony.¹³¹ The colonies enacted various English reforms to the 1862 Act and experimented with different amendments of their own.¹³² However, by the late 1950's, corporations, frustrated with the problems of doing business within six different legislative regimes and recognizing the existence of the national character of the Australian economy, pushed for the adoption of federal uniform companies legislation. However, a restrictive reading of Section 51(xx) of the Commonwealth Constitution¹³³ by the High Court of Australia by its decision in *Huddert, Parker & Co. v. Moorehead*¹³⁴ rendered the Commonwealth Parliament unable to enact national legislation in the corporate field.¹³⁵ As a result, "[i]n 1959, a committee of State and Commonwealth Attorneys-General was created to draft companies legislation to be uniform throughout Australia. [T]he committee . . . relied heavily on the Companies Act 1958 [and] adopted provisions from a wide range of other sourc-

formed by residents of the colony in 1817 as a partnership." Paul Redmond, *A Short History of Securities Regulation in Australia*, in *SECURITIES REGULATION IN AUSTRALIA AND NEW ZEALAND* 90, 90 (1994).

131. *Id.* at 91.

132. Victoria led the way creating a no-liability company in 1871, called the Mining Companies Act 1871 (Vic.), which was developed to defeat fraudulent practices and implement reforms proposed by the Davey Committee on company accounts and audit. *Id.* at n.11. In 1957, Victoria enacted the Companies Act 1958, and became the first Australian state to adopt the Cohen Committee reforms. *Id.* at 92 (stating that "[t]hese reforms were among the sources drawn upon in preparing the first . . . Australian statute on companies, the so-called Uniform Companies Acts of 1961-1962.").

133. Section 51(xx) of the Commonwealth of Australia Constitution Act grants Parliament "the power to make laws for the peace, order, and good government of the Commonwealth with respect to [f]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." The Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., ch. 12, § 51(xx) (Austl.); COLIN HOWARD, *AUSTRALIAN FEDERAL CONSTITUTIONAL LAW* liii (3d ed. 1985); P.H. LANE, *AN INTRODUCTION TO THE AUSTRALIAN CONSTITUTIONS* 268 (6th ed. 1994).

134. 44 C.L.R. 492.

135. While § 51(xx) seems to grant Parliament broad regulatory power over a wide array of commercial entities, Chief Justice Griffith declared that the Constitution did not confer the power to regulate the trading activities of corporations. In reaching this conclusion, Chief Justice Griffith relied heavily on "the context of the Constitution, and in particular the reservation to the States of the power to enact domestic trade and commerce [legislation] was critical." PETER J. HANKS, *CONSTITUTIONAL LAW IN AUSTRALIA* 290 (1996).

es¹³⁶ ultimately creating the first Uniform Companies Act which was subsequently enacted by all of the States and territories of Australia.¹³⁷ As was the case in Canada, however, the uniform legislation was never really uniform.¹³⁸ Each State adopted the legislation with its own modifications, thus creating a system which contained a number of "substantive and technical differences between the States"¹³⁹ and left the problem virtually unchanged. The variations became more widespread after the "collapse of the debenture boom"¹⁴⁰ which revealed weaknesses in the regulation of corporate borrowing and prompted the States to amend their companies legislation yet again, thus leaving "the fabric of uniformity . . . torn."¹⁴¹

The push for a securities and exchange commission arose after events transpired which were eerily similar to those of Bre-X. On October 1, 1969, a small mineral explorer, Poseidon NL,¹⁴² announced the discovery of substantial amounts of nickel and copper at its Windarra mine in Western Australia.¹⁴³ The company's stock price soared, reaching a value of over \$200 per share by the end of the year and prompting speculative activity in other mining exploration companies.¹⁴⁴ News of Poseidon attracted the attention of Parliament, and amidst complaints of insider trading and a failure of the local exchanges to properly investigate the matter, the Senate resolved,

that a Select Committee be appointed to inquire into and report upon the desirability and the feasibility of establishing a securities and exchange commission by the Commonwealth either alone or in co-operation with the States and the powers and functions necessary for such a commission to enable

136. Redmond, *supra* note 130, at 92.

137. *Id.*

138. *See supra* Part I.

139. Redmond, *supra* note 130, at 92.

140. *Id.* at 92-93. A debenture is "a promissory note or bond backed by the general credit and earning history of a corporation and usually not secured by a mortgage or lien on any specific property; e.g., an unsecured bond. Holders of corporate debentures are creditors of the corporation and entitled to payment before shareholders upon dissolution." BLACK'S LAW DICTIONARY 401 (6th ed., 1990).

141. Redmond, *supra* note 130, at 93.

142. NL stands for no liability.

143. *See* Redmond, *supra* note 130, at 93.

144. *Id.*

it to act speedily and efficiently against [such] improper or injurious practices as the committee finds have occurred or may occur in relation to shares and other securities of public companies, and to recommend [such] measures . . . as will . . . enable the utmost protection of members of the public and the national interest.¹⁴⁵

The committee report, released in 1974, detailed findings of numerous unfair practices and criticized the various State and Territorial legislators for their inadequate performance in regulating the securities markets.¹⁴⁶ Asserting that securities markets had become national in scope, the committee recommended the adoption of a national securities regulator.¹⁴⁷ The committee received assistance in 1971 from the High Court¹⁴⁸ when it overruled its previous holding in *Huddart*¹⁴⁹ and seemingly made federal legislation a possibility. Attempting to seize the moment, the Australian government prepared a draft bill containing national legislation, but the party was voted out of power the day before the bill was to be introduced to the House of Representatives.¹⁵⁰

The cooperative scheme adopted by Australia in lieu of the national regime did not fare any better than previous legislation. Balking at the idea of a national securities regulator, the new government continued to pursue uniform companies legis-

145. *Id.* at 94.

146. *Id.*

147. *Id.*

148. See *Strickland v. Rocla Concrete Pipes Ltd.* (1971) 124 C.L.R. 468.

149. See Redmond, *supra* note 130, at 95. The High Court declared that in *Huddart Parker* it had placed too much reliance on the doctrine of reserved powers, a doctrine which contradicted the Constitution, and thus, the reasoning and decision were faulty. Chief Justice Barwick explained:

Section 107 of the Constitution . . . leaves [the States the] residue of power after full effect is given to the powers granted to the Commonwealth. [T]hus [*Huddart Parker*] virtually reversed the Constitution. The question in relation to the validity of a Commonwealth Act is whether it fairly falls within the scope of the subject matter granted to the Commonwealth by the Constitution.

While the High Court held that the challenged regulations in the *Strickland* case did fall within the ambit of § 51(xx), it refused to define the limits of the Constitutional provision declaring instead that the law must develop on a case by case basis. See *Strickland*, 124 C.L.R. at 489.

150. The bill was introduced to the House as a private members bill the following year, but was defeated. See Redmond, *supra* note 130, at 95 (stating that the bill lapsed upon the dismissal of the Whitlam Government).

lation as a viable solution.¹⁵¹ The new scheme consisted of a three-tiered regulatory hierarchy. At the top was the Ministerial Council, a body comprised of the Attorneys-General of each of local governments as well as the Commonwealth-General.¹⁵² Directly below was a newly created body, the National Companies and Securities Commission (NCSC), designed as the central administrator of the regime.¹⁵³ Finally, each State maintained a Corporate Affairs Commission (CAC) to perform the bulk of administrative duties under the scheme.¹⁵⁴ While the new regime was successful in establishing uniform companies regulation throughout Australia, it, too, was plagued by problems and found itself unable to adequately fill the void in Australia's company and securities legislation.¹⁵⁵

Growing dissatisfaction with the ineffectiveness of the NCSC to properly enforce corporate law led to an inquiry by the Senate Standing Committee on Constitutional and Legal Affairs.¹⁵⁶ In a report released May 1987, the Committee concluded that "the cooperative system had outlived its usefulness"¹⁵⁷ and that comprehensive national legislation regulating corporations and securities should be enacted to fill the gap. The result of this recommendation was the drafting of the

151. *Id.* at 96-97.

152. *Id.* at 97.

153. *Id.*

154. *Id.* See also Colleen Ryan, *Bringing Law and Order to the Corporate Frontier*, INSTITUTIONAL INVESTOR, Aug. 1989, at 90 (indicating that the state CACs derived their powers as delegates of the NCSC which was, in turn, responsible to the Ministerial Council, composed of the attorneys general of the six states and the national government).

155. "Under the 1978 agreement, the Commonwealth was bound to enact amending legislation agreed upon at a [meeting of the] Ministerial Council by a simple majority. Each participant had one vote on new legislation and the Commonwealth could find itself having to arrange the passage of legislation of which it did not approve." BAXT, *supra* note 95, at 4. Further, despite being above the CACs in the hierarchical system, the NCSC could not force States to investigate alleged wrongdoings. In addition, the NCSC found itself tremendously understaffed and underfunded, thus making it unable to deliver on its promise "to deliver tough penalties to stockmarket sharks." *Brucing Up the Shark Patrol*, ECONOMIST, June 11, 1988, at 78. Finally, it was said that "the scheme's division of responsibility between the State and Federal regulators [made] them ineffective to enforce corporate law adequately. That in turn was said to cause [investors] to question the integrity of the Australian markets." BAXT, *supra* note 95, at 4.

156. See Ryan, *supra* note 154.

157. *Id.*

Corporations Act 1989 (the 1989 Act),¹⁵⁸ which entered into force on January 1, 1991.¹⁵⁹

The 1989 Act created a truly national legislative scheme, and thus succeeded where its predecessors had failed. According to the 1989 Act, a corporate body, the Australian Securities Commission (ASC),¹⁶⁰ is to be the sole administering authority of corporate and securities law throughout Australia.¹⁶¹ "State and Territorial corporate affairs authorities are to have no further authority in areas of regulation confided to the [Commission]."¹⁶² The ASC is to be comprised of "no less than three nor more than eight members" appointed by the Governor-General.¹⁶³ In addition, "[t]he [Commission is] required to establish a regional office in each State and Territory and to establish such other offices as it thinks fit."¹⁶⁴ The offices, under the charge of a Regional Commissioner, are responsible for

158. Corporations Act 1989, ch. 1 (Austl.).

159. Prior to the adoption of the Act, the Commonwealth faced a constitutional challenge from New South Wales, South Australia and Western Australia which were uneasy about losing the significant revenue generated by corporate registration fees. The challenge alleged that § 51(xx) does not grant Parliament the power to regulate incorporation of companies. The High Court agreed with the States, declaring that "the words 'formed within the limits of the Commonwealth,' exclude the process of incorporation itself." *N.S.W. v. Commonwealth*, (1990) 90 A.L.R. 355, 355. Subsequently, an agreement between Parliament and the States was reached whereby the States agreed to relinquish control over powers of incorporation in return for a share of the revenues generated by registration fees. See HANKS, *supra* note 135. Thus, the amended version of the Corporations Act includes a provision whereby "each State and the Northern Territory was to enact legislation requiring courts and others to treat the applied as if it were a law of the Commonwealth." BAXT, *supra* note 95, at 5.

160. The Commission was created by the enactment of the Australian Securities Commission Act 1989. See Australian Securities Commission Act 1989 § 7 (Austl.) [hereinafter ASCA].

161. *Id.* § 5.

162. BAXT, *supra* note 95, at 5. The Ministerial Council was to continue under the new law, but with greatly diminished responsibility. For instance, it had no control over the ASC as it had with the old NCSC and its power over the legislative process was greatly diminished under the new arrangements. *Id.*

163. ASCA, *supra* note 160, §§ 8, 9(1)-(2). The Commission is presently comprised of the Chairman (Alan Cameron), the Deputy Chairman (Lynn Ralph), and the Statutory Member (Bill Robinson). See CORPORATE RELATIONS UNIT, AUSTRALIAN SECURITIES COMMISSION, OBJECTIVES AND ORGANISATION OF THE AUSTRALIAN SECURITIES COMMISSION (July 1995) [hereinafter ASC CORPORATE RELATIONS UNIT].

164. BAXT, *supra* note 95, at 7. Section 95 of the ASCA states that "in deciding on the number and location of its offices, the Commission shall seek to ensure that it serves adequately the needs of business communities throughout Australia." ASCA, *supra* note 160, § 95.

the "principal regulatory and investigative functions of the Commission."¹⁶⁵ Section 3(2) of the Australian Securities Commission Act (ASCA) sets forth the goals of the Commission:

In performing its functions and exercising its powers, the Commission shall strive:

(a) to maintain, facilitate, and improve the performance . . . of the securities markets . . .

(b) to maintain the confidence of investors in the securities markets . . . by ensuring adequate protection for such investors;

(c) to achieve uniformity throughout Australia in how the Commission and its delegates perform those functions and exercise those powers . . .

(g) to take whatever action it can take, and is necessary in order to enforce and give effect to national scheme laws.¹⁶⁶

By virtue of Section 3(g), quoted above, the Commission is given virtually unlimited powers when performing its duties. This "necessary and proper clause"¹⁶⁷ is reiterated in Section 11(4) which states that "[t]he Commission has the power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions."¹⁶⁸ Included in these powers is the right to institute proceedings against alleged violators of the law,¹⁶⁹ and the right to levy fines and

165. BAXT, *supra* note 95, at 7. Examples of the Regional Offices' duties are: scrutiny of prospectuses, takeover documents, and company accounts; investigations into contraventions of the law; regulation of the securities markets; licensing and monitoring of securities dealers, advisors and futures brokers; and registration of auditors and liquidators. See ASC CORPORATE RELATIONS UNIT, *supra* note 163.

166. ASCA, *supra* note 160, § 3(2).

167. Article I, Section 8 of the U.S. Constitution grants Congress the right "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8.

168. ASCA, *supra* note 160, § 11(4).

169. Section 49 declares:

imprisonment for violations of provisions of the ASCA.¹⁷⁰

The 1989 Act does not suffer from the multitude of weaknesses which hampered the cooperative scheme, and, as a result, it has not suffered the same fate.¹⁷¹ While the cooperative scheme was said to have offended "fundamental democratic principles because it was a fragmented regime in which no Parliament, no Government, and no Minister had responsibility for the scheme,"¹⁷² the same can not be said about the new system in which every aspect is controlled by the federal government or one of its agencies. Funded entirely by the Commonwealth,¹⁷³ the ASC, unlike the NCSC,¹⁷⁴ is accountable only to the Commonwealth Attorney-General, who is given significant power to direct the ASC to pursue certain policies and investigate certain cases.¹⁷⁵ Thus, administration of Australian corporate and securities law rests solely in the hands of the Commonwealth.

Enforcement of the law under the new regime is administered completely by the Commonwealth. Although not technically federal law, the agreement reached by the Commonwealth and the States prior to the enactment of the 1989 Act¹⁷⁶ effectively made the legislation equivalent to that of Commonwealth legislation. Therefore, "offenses against any applied law [are] treated as Commonwealth offenses coming under the purview of the Australian Federal Police and the

Where as a result of an investigation or from a record or an examination it appears to the Commission that a person may have committed an offense against a national scheme law or a relevant previous law of this jurisdiction, and ought to be prosecuted for the offense, the Commission may cause a prosecution of the person for the offense to be begun and carried out.

Id. § 49.

170. For example, Section 64 provides for a fine and/or imprisonment to be levied upon a person who at a hearing gives "information or makes a statement that is false or misleading." *Id.* § 64.

171. At the time of this writing, the Corporations Act, 1989 still provides the foundation for the corporate and securities legislation of Australia and the ASC is still the sole administering body.

172. BAXT, *supra* note 95, at 4.

173. In 1993/1994, the Commonwealth earmarked 136.1 million Australian dollars to the ASC. See ASC CORPORATE RELATIONS UNIT, *supra* note 163.

174. The NCSC was accountable to the Ministerial Council, made up of the attorneys-general of each of the States, the Northern Territory and the Federal Government. See Ryan, *supra* note 154.

175. See BAXT, *supra* note 95, at 6.

176. See HANKS, *supra* note 135.

Commonwealth Director of Public Offenses.¹⁷⁷ Thus, with investigations being run by the ASC and prosecutions being conducted by the federal prosecutor, enforcement of the law has finally been removed from the jurisdiction of the States and the Northern Territory (which had in the past either inadequately performed their duties or refused to perform them altogether),¹⁷⁸ and placed squarely within the realm of the Commonwealth. This change brought legitimacy back to the Australian markets and confidence back to the investing public.

The legislative process was also amended under the new law to give the Commonwealth virtually complete control. Whereas under the cooperative scheme the States and the Northern Territory had firm control over the enactment of new legislation,¹⁷⁹ under the new scheme, their powers are greatly diminished. "Legislative reform on national markets (takeovers, securities, public fundraising, and futures) [is] be the sole responsibility of the Commonwealth [and while] other proposals are to be considered and approved by the [Ministerial] Council, the Commonwealth is not obliged to introduce any proposal of which it does not approve."¹⁸⁰ After years of experimenting with different corporate and securities legislative schemes, Australia finally succeeded in enacting a viable system of regulation. Nearly fifty years prior to the enactment of the 1989 Act, Australians realized that local regulation of a national industry was an impossibility. Through cooperation, the federal government hoped to put the problems associated with regulating the corporate and securities fields behind them, but unfortunately, troubles persisted. While taking complete control away from the local governments was a drastic measure, Australia realized this was the only way to finally put an end to the problems the industries faced. The 1989 Act transferred complete control of the corporate and securities fields to the Commonwealth and succeeded in eliminating the problems that had plagued prior systems, such as a lack of uniformity and an inability to enforce the law. Thus, through the implementation of federal legislation, Australia was finally

177. *Id.* at 5.

178. *See id.* at 4.

179. *See Redmond, supra* note 130.

180. BAXT, *supra* note 95, at 5.

able to put an end to the nightmare that haunted the corporate and securities systems throughout the years.

IV. CONCLUSION

Successful regulation of the Canadian securities markets demands intervention by the federal government. "The evidence has repeatedly established that the securities market is a national market."¹⁸¹ Over the years, the provinces have come to realize this fact and have attempted to cooperate with one another in an effort to make legislation uniform throughout the country. Even uniformity is not enough, though. "Issuers and investors demand liquid, transparent, well informed markets with low transaction (including regulatory) costs and high integrity. If [a] market [does] not satisfy these requirements, transactions can easily flow elsewhere."¹⁸² While cooperation and uniformity would help solve many of the problems facing the Canadian system, it can not help overcome the limitations imposed by the Canadian Constitution. Because at present, the provinces are unable to legislate or enforce the law beyond their territorial boundaries, absent a federal Constitutional amendment, the provinces will never be able to effectively regulate the securities markets in Canada. Although "successive generations of Canadian courts and members of the Privy Council have fostered the vision of a strong cooperative federalism in which . . . duplication of powers by the two levels of government were regarded as wholesome, and . . . a reasonable price [to pay] for the greater evil of excessive centralism,"¹⁸³ this philosophy will have to give way if the Canadian markets are to survive. Federal participation is needed to restore the integrity of the markets and the confidence of investors. The tale of Bre-X Minerals Ltd. merely provided the latest illustration of this now long overdue reality.

The development of the present securities system in Australia provides a brilliant example of the benefits which can result from federal participation in the securities industry. Suffering from nearly the identical problems which face the Canadian securities industry, the Commonwealth of Australia

181. Redmond, *supra* note 132, at 94.

182. Waitzer & Sahazizian, *supra* note 102, at 102.

183. Ziegel, *supra* note 103, at 2-3.

stepped forward and assumed responsibility for an industry in disarray. Realizing that cooperation was not the answer, the Commonwealth Parliament created a system which took control completely away from the States and the Northern Territory, which like the Canadian provinces, were ineffectively administering and enforcing the law. Through the enactment of federal uniform legislation and the creation of a federal body to administer securities law and investigate alleged violations throughout the country, enforcement became a reality and efficiency returned to the markets. A streamlined legislative process able to quickly respond to changes in information and technology provided uniformity throughout the country, eliminating the difficulties and confusion that resulted from the substantive differences in State legislation. In short, by assuming control of the corporate and securities industry, the Australian Commonwealth brought order to chaos.

Canada's securities industry remains in a state of chaos. The federal government must follow the example of the Australian Parliament and assume legislative control of the corporate and securities industry.¹⁸⁴ Whether the form the legislation takes mirrors that of Australia is not important. What is important is that future law concerning Canada's securities system transfers complete control away from the provinces and grants full control to the federal government. Only then will Canada's tarnished reputation be restored to a respectable level, and only then will the problems the Canadian securities industry faces finally be resolved.

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184. "In June 1996, 8 of the 10 provinces endorsed the idea of a federally operated Canadian Securities Commission which would exercise regulatory responsibilities to be transferred by the provinces." Stikeman, Elliot, *supra* note 128, at 32.

